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Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration

Compilation of comments

Note by the Secretariat

Addendum

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II. Comments on the draft convention

C. European Union

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1. Upon invitation by the UNCITRAL Secretariat, the European Union hereby submits its comments on the UNCITRAL draft convention on transparency (Document (A/CN.9/812)) for consideration at the next annual session of the United Nations Commission on International Trade Law (New York, July 2014).

Draft preamble

2. For the sake of drafting consistency, the European Union supports the Secretariat's suggestion to add the word "investment" after the word "concluded" in the fourth paragraph of the preamble.

3. The European Union has no objections to the suggestion made by the UNCITRAL Secretariat to include as a last paragraph of the preamble, the phrase "Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency".

4. The European Union also supports the Secretariat's drafting suggestion to use the words "Party" or "Parties" when referring to a party or to parties to the Convention, and to use the words "contracting party" or "contracting parties" when referring to a party or to parties to an investment treaty.

Draft Article 1

5. The European Union supports the Secretariat's suggested new drafting of article 1(1) which clarifies that the term "investor-State arbitration" encompasses arbitration between an investor and a State, or between an investor and a regional economic integration organization. The European Union also welcomes the insertion of a definition of "investor-State arbitration" in article 1(1) in order to avoid repetitions in the text of the Convention.

Draft Article 2

6. The European Union is satisfied with the drafting of article 2(2) and does not, at this stage, consider it necessary to replace article 2(2) by the alternative drafting presented in paragraph No. 21 of Document A/CN.9/812.

7. The European Union can support the suggestion made by the Secretariat to delete the words "as they may be revised from time to time" from articles 2(1) and 2(2), upon the condition that the substance of the matter of application of the Rules on Transparency in the event of revision will be addressed as currently reflected in articles 2(3) and 3(2).

8. As regards article 2(5), the European Union believes that the words "or non-application" could be deleted. In addition to possible difficulties which may arise in understanding and interpreting the expression "to seek to alter [...] the non-application", the European Union believes that the substance of these words is already comprised in the expression "to seek to alter the application" which, in the

European Union's understanding, would also cover attempts to make applicable, via a most-favoured nation clause, the transparency rules in circumstances where the rules would not otherwise apply. Furthermore, the records of the discussions of UNCITRAL Working Group II make sufficiently clear that the aim of article 2(5) is to address both scenarios which may arise with respect to most-favoured nation provisions, i.e. seeking to avoid the application of the transparency rules where the rules would otherwise apply, or seeking to make the rules applicable where the rules would otherwise not apply.

Draft Article 3

9. The European Union supports the Secretariat's suggestion to use the words "specific set of arbitration rules" instead of "certain sets of arbitration rules" in draft article 3(1)(b) upon the understanding that declarations under article 3(1)(b) could be made with respect to "all" or to "some" specific sets of arbitration rules or procedures other than the UNCITRAL arbitration rules (see document A/CN.9/799, § 126).

10. For the sake of ensuring coherence with the current draft articles 3(1)(b) and 3(1)(c), the European Union suggests inserting the words "in investor-State arbitration in which it is a respondent" at the end of article 3(2). However, this amendment might not be strictly necessary if the current draft proposal for article 2(3) ("Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the arbitral tribunal shall apply the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2)") were retained in the final version of the Convention.

Draft Article 4

11. The European Union can support the substance of the new draft Article 4(6) upon the understanding that the words "with the effect of making such a withdrawal" are intended to cover withdrawals or modifications of reservations which expand the scope of application of the transparency rules (see document A/CN.9/799, § 64).

12. For greater certainty, it may however be useful to clarify the exact interplay between the drafting of articles 3(1)(a) and 3(1)(b) on the one hand, and article 4(6) on the other hand. For example, it doesn't seem fully clear whether "a" declaration made under article 3(1)(a) which would carve-out ten investment treaties from the scope of application of the transparency rules should be considered as being one single reservation or ten reservations. As similar question is whether a declaration under article 3(1)(b) which would exclude two specific set of arbitration rules from the scope of the Convention should be considered as being one or two reservations. In the second scenario (a declaration covering ten treaties equals ten reservations), the words "or modifies any existing reservation to this Convention with the effect of making such a withdrawal" in article 4(6) may not be necessary. In the first scenario (a declaration covering ten treaties equals one reservation), article 4(6) would need to address the modification of such reservations (e.g. if the number of carved-out investment treaties listed in a single reservation would be reduced from ten to five).

Draft Article 5

13. The European Union supports the Secretariat's suggestion to relocate the provision on the temporal scope of application of the Convention and reservations just after article 4. The European Union also supports the change in the name of the article from "time of application" into "application to investor-state arbitrations". For the sake of clarity, the European Union would however suggest replacing the words "in respect of each Party" at the end of the new draft article 5 by the words "in respect of each Party concerned".